STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0798

Bryan Wiseth,
Appellant,

vs.

James W. Thorson, et al.,
Defendants,

John T. Levendofsky and Fayrenne Levendofsky
as co-trustees of the Levendofsky Family Trust dated January 15, 1997,
Respondents.

Filed February 11, 2013
Affirmed
Hooten, Judge

Marshall County District Court
File No. 45-CV-11-234

Kevin T. Duffy, Thief River Falls, Minnesota (for appellant)

Daniel L. Rust, Matthew J. Rust, Rust, Stock, Rasmusson & Knutson, P.A., Crookston, Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Hooten, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

Appellant challenges the district court's conclusion that respondent is a good-faith purchaser of certain real property, arguing that respondent had implied notice of his prior interest in the property. Because respondent did not have notice of any facts indicating that appellant had an ownership or possessory interest in the real property purchased by respondent, we affirm.

FACTS

This is a quiet-title action brought by appellant Bryan Wiseth regarding real property in Marshall County. Wiseth owned the property prior to 1987. On December 4, 1987, Wiseth and his then-wife, Marie Wiseth, executed and delivered a quit-claim deed in favor of defendant James Thorson. The deed was recorded that same day. Despite the conveyance, Thorson never provided any consideration to Wiseth. As a result, Thorson conveyed the same property back to Wiseth, as a single individual, by a quit-claim deed dated August 18, 1999. This deed was not recorded until June 9, 2011.

Despite Thorson's conveyance of his interest in the property back to Wiseth in 1999, Thorson and his wife executed a purchase agreement with respondent Levendofsky Family Trust (the Trust) on December 10, 2010. The purchase agreement was intended to convey the same real property Thorson had previously conveyed back to Wiseth, with the exception of a ten (10) acre parcel located in the southeast corner of the real property, with "the exact legal description of which [was] to be subsequently determined." The excepted parcel included the home in which Wiseth had resided throughout the relevant

period. The total purchase price was $275,000, which was to be paid largely by a swap of property owned by the Trust in Nebraska. Pursuant to the purchase agreement, Thorson and his wife executed a warranty deed to the Trust on January 27, 2011. This deed was recorded on February 9, 2011, four months before the 1999 deed from Thorson to Wiseth was recorded.

In an affidavit, John Levendofsky, one of the co-trustees of the Trust, stated that Thorson told him that the excepted property was being excluded from the sale of the tract of land because "his brother-in-law needed a place to live." Levendofsky stated that he visited the property in the winter and the "ground was snow covered and showed no indication of being farmed by anyone." Levendofsky also indicated that "Thorson never indicated to [him] that he was not the owner of the" property and that he "was unaware of [Wiseth]'s claim to the land until this lawsuit was started." At the time of the purchase, the Trust obtained a title insurance policy based on the title purportedly held by Thorson. At the time of Thorson's sale of the property to the Trust, there were no other interceding interests recorded in the Marshall County Recorder's Office.

During his visit to Marshall County, Levendofsky also visited the Farm Services Agency (FSA) to inquire about the property's enrollment in the federal Conservation Reserve Program (CRP). The purchase agreement indicated that the property would be transferred "[s]ubject to [CRP] Reserve Contract with the Department of Agriculture, Commodity Credit Corporation, Contract Agreement No. 2836B on Farm No. 6198 in which Bryan Wiseth will continue to receive the payment on said contract." The CRP forms Levendofsky viewed at the FSA "indicated that James Thorson and Brian [sic]

Wiseth were 'Participants' on the land. The FSA staff told [Levendofsky] that Mr. Thorson had signed the forms as the owner and that [Wiseth] was the operator." The CRP form submitted to the court indicates that 372.1 acres were enrolled in the program and lists both Wiseth and Thorson as participants. Next to each party's name the form indicates a share for each party, with Wiseth's share being "100%" and Thorson's being "0%." Finally, the CRP form indicates that the contract binds the "undersigned owners, operators, or tenants (who may be referred to as 'the [p]articipant[s]')." Both Wiseth and Thorson signed the CRP form.

Wiseth commenced this suit against the Trust, seeking to quiet title.[1] The Trust moved for summary judgment, which the district court granted, deciding that the Trust was a good-faith purchaser because "[t]he record does not disclose any facts based on which the Levendofskys should have done further inquiry into [Wiseth]'s rights in the land." This appeal follows.

D E C I S I O N

A motion for summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "The party moving for summary judgment has the burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Valspar*

[1] Both Wiseth and the Trust alleged fraud against the Thorsons. The district court granted default judgment to both parties against the Thorsons, who have not answered or otherwise appeared in this matter.

Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359, 364 (Minn. 2009). However, a party opposing summary judgment "may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05.

A district court's summary-judgment decision is reviewed de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "On an appeal from summary judgment, the role of the reviewing court is to review the record for the purpose of answering two questions: (1) whether there are any genuine issues of material fact to be determined, and (2) whether the [district] court erred in its application of the law." *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). The reviewing court may not weigh the evidence or make factual determinations, but must consider the evidence in the light most favorable to the nonmoving party. *McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008).

"The purpose of the Minnesota Recording Act is to protect recorded titles against the gross negligence of those who fail to record their interests in real property." *Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 278 (Minn. 2010). The relevant portion of the Minnesota Recording Act reads as follows:

> Every conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any part thereof, whose conveyance is first duly recorded, and as against any attachment levied thereon or any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record prior to

> the recording of such conveyance. The fact that such first recorded conveyance is in the form, or contains the terms of a deed of quitclaim and release shall not affect the question of good faith of such subsequent purchaser or be of itself notice to the subsequent purchaser of any unrecorded conveyance of the same real estate or any part thereof.

Minn. Stat. § 507.34 (2012). Minnesota is a race-notice state, such that being first to record will only protect a party's interest when that party has no notice of a prior interest. *Washington Mut. Bank, F.A. v. Elfelt*, 756 N.W.2d 501, 506 (Minn. App. 2008), *review denied* (Minn. Dec. 16, 2008).

The parties do not dispute that the Trust's deed from Thorson was recorded before Wiseth's deed from Thorson. As a result, the statute dictates that the Wiseth deed is "void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate" who records their deed. Minn. Stat. § 507.34. There is also no dispute that the Trust's transaction was conducted for valuable consideration. Thus, the question here is whether the Trust purchased the property in good faith. "A 'good faith purchaser' is someone 'who gives consideration in good faith without actual, implied, or constructive notice of inconsistent outstanding rights of others.'" *MidCountry Bank v. Krueger*, 782 N.W.2d 238, 244 (Minn. 2010) (quoting *Anderson v. Graham Inv. Co.*, 263 N.W.2d 382, 384 (Minn. 1978)); *see also Nussbaumer v. Fetrow*, 556 N.W.2d 595, 598 (Minn. App. 1996) ("[T]he protection of the act is lost to creditors with actual, constructive, or inquiry notice of a third party's rights in the property inconsistent with the judgment debtor's."), *review denied* (Minn. Feb. 26, 1997). It is undisputed that the

Trust did not have actual or constructive notice of Wiseth's ownership interest in the real property.

However, Wiseth argues that the Trust had implied notice of his interest. Implied notice arises when the purchaser "had knowledge of facts which ought to have put him on an inquiry that would have led to a knowledge of such conveyance." *Miller v. Hennen*, 438 N.W.2d 366, 370 (Minn. 1989) (quotation omitted). Implied notice is based on the longstanding rule that "if a subsequent purchaser was aware that someone other than the vendor was living on the land, the purchaser would have a duty to inquire concerning the rights of the inhabitant of the property and would be charged with notice of all facts which such an inquiry would have disclosed." *Miller*, 438 N.W.2d at 370; *see also Teal v. Scandinavian-Am. Bank*, 114 Minn. 435, 441, 131 N.W. 486, 488 (1911) (holding that, where the purchaser "was expressly informed" that another party was in possession of property but "made no inquiry" of the possessor and relied on the seller's statements, the purchaser "is chargeable with notice of the actual condition of the title to the land"); *Claflin v. Commercial State Bank of Two Harbors*, 487 N.W.2d 242, 248 (Minn. App. 1992) (applying *Miller*), *review denied* (Minn. Aug. 4, 1992). Thus, "[t]hird-party possession of property constitutes inquiry notice to a judgment creditor if it is an actual, open, visible, and exclusive possession, inconsistent with the title of the record owner." *Nussbaumer*, 556 N.W.2d at 598 (quotation omitted).

Wiseth makes several fact-based arguments that the Trust had implied notice of his interest in the property, but these do not present genuine issues of material fact. First, Wiseth argues that his longtime residence in the home on the property gave the Trust

notice of facts that should have led to further inquiry. However, the homestead portion of the land was not part of the conveyance from the Thorsons to the Trust. There was nothing that would have put the Trust on notice that Wiseth may have had an ownership or possessory interest in the real property that was the subject of the purchase agreement between the Thorsons and the Trust. There was nothing about the property that, when viewed by Levendofsky, would have indicated that the property was possessed by anyone. Thus, Levendofsky, in viewing the property before purchase, found no buildings and no one in possession of the subject property, which would have required him to inquire of the possessor. It is typically exclusive possession that invokes a buyer's duty to inquire of the status of the possessor's interest. *Miller*, 438 N.W.2d at 370; *Nussbaumer*, 556 N.W.2d at 598. Wiseth notes that Levendofsky "conveniently" viewed the property in the winter, insinuating that there was some ulterior motive in the date of his visit. But the property at issue was enrolled in CRP and would not have been actively used for farming regardless of the time of year it was viewed.[2] Even if the land had been farmed or tended to, it is not clear how that would have raised a duty to investigate because having another tend to the land would not be inconsistent with Thorson's ownership interest, particularly when Thorson did not live nearby. While Wiseth argues that Levendofsky should have investigated the possessors of land abutting the subject property or at least stopped by to say hello to his new neighbors, he has cited no legal

[2] The CRP contract in the record does not contain a copy of the conservation plan for the land, but applicable federal regulations indicate that, among other requirements, "vegetative cover" on the land was required and that "grazing, harvesting, or other commercial use of any crop from the cropland" was not allowed. 7 C.F.R. § 1410.20(a)(2), (3), (5), (6) (2012).

authority that creates a duty to inquire or meet with the possessors of land abutting the subject property prior to buying such property.

Finally, Wiseth argues that the presence of his name on the CRP contract should have "tweaked" Levendofsky's curiosity regarding Wiseth's interest in the property. The CRP contract indicates that Wiseth is a participant, a status that is defined elsewhere on the contract as including operators of the land. Wiseth's status as an operator was further supported by information from the FSA, which also indicated that he was an operator. Again, operator status is not inconsistent with Thorson's ownership of the property, particularly when Thorson was also listed as a participant in the CRP contract.

Wiseth argues that this case involves a buyer who simply relied on the representations of the seller without conducting an independent investigation when the buyer knew that another party had a possessory interest in the property. *See, e.g.*, *Claflin*, 487 N.W.2d at 248 (rejecting the putative good-faith purchaser's argument that "it satisfied its duty of inquiry by asking [the grantor] what interest [the possessor] had in the Property"). But *Claflin* is distinguishable from the instant case. Here, there was no actual or implied knowledge that another party had possession of the property; Wiseth's possession of the excepted land did not indicate that he had possession of the whole tract. Moreover, there was an investigation by the buyer into the legal status of other potential interests; Levendofsky viewed the property, viewed the CRP contract, and spoke with local FSA officials. He found nothing inconsistent with the recorded title on file.

We again note that "[t]he purpose of the Minnesota Recording Act is to protect recorded titles against the gross negligence of those who fail to record their interests in

real property." *Citizens State Bank*, 786 N.W.2d at 278. The Trust purchased the property for consideration from the last titleholder of record and was not on notice of any facts requiring it to inquire further than it did. To the extent that Wiseth may have been the victim of a fraudulent conveyance, Wiseth's gross negligence in failing to record his deed for nearly 12 years is the cause. There is nothing in these facts, even when construed in Wiseths' favor, that creates a genuine issue of material fact about the Trust's duty to inquire further into Wiseth's potential interest. Moreover, Wiseth has not identified any facts that could be produced in further proceedings or at trial that would warrant a different result. As a result, we conclude that the district court did not err in granting summary judgment to the Trust.

Affirmed.